[2019] UKFTT 515 (TC)

Capital gains tax – Payment under a guarantee in respect of loan to company – Whether allowable loss – Whether 'qualifying loan' – Whether company commenced trading – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07311

Appeal number: TC/2017/07090

BETWEEN

MICHAEL JOHN HUNT **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 15 & 16 July 2019

Ian Mayes QC and Malcolm Frost, instructed by Clyde & Co LLP for the Appellant

Simon Bracegirdle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Michael John Hunt appeals against a decision of HM Revenue and Customs ("HMRC"), dated 6 February 2017 and confirmed on 9 August 2017 following a review, to amend his 2009-10 self-assessment tax return to deny his claim for relief under s 253(4) of the Taxation of Chargeable Gains Act 1992 ("TCGA") for capital losses of £4,905896 incurred as a result of being called upon to make a payment of £17,602,601 under a personal guarantee given to Barclays Bank in respect of a loan to Altala Group Limited ("Altala").

2. It is not disputed that Mr Hunt made a payment, through his nominee the ABC Corporation, of £17,602,601 pursuant to a guarantee of a loan to Altala in 2009-10 which has become irrecoverable; that the guarantee was given on the instructions of the ABC Corporation; and that the loan was used by Altala for the purposes of setting up a trade. The sole issue before the Tribunal is whether Altala commenced trading. If so, it is agreed that Mr Hunt is entitled to the relief claimed.

3. Mr Ian Mayes QC, leading Mr Malcolm Frost, for Mr Hunt, contends that Altala did commence trading. However, although he accepts that Altala was carrying on a business, Mr Simon Bracegirdle, for HMRC, submits that its activities did not amount to trading.

LAW

4. Under s 2 TCGA a person is chargeable to capital gains tax ("CGT") in respect of chargeable gains accruing to him in a year of assessment after deduction of any allowable losses which, according to s 16 TCGA are to be computed "in the same way" as gains.

5. Insofar as applicable to the present case, s 253 TCGA provides:

> **253 Relief for loans to traders**
>
> (1) In this section "a qualifying loan" means a loan in the case of which—
>
> (a) the money lent is used by the borrower wholly for the purposes of a trade carried on by him, not being a trade which consists of or includes the lending of money, and
>
> (b) the borrower is resident in the United Kingdom, and
>
> (c) the borrower's debt is not a debt on a security as defined in section 132;
>
> and for the purposes of paragraph (a) above money used by the borrower for setting up a trade which is subsequently carried on by him shall be treated as used for the purposes of that trade.
>
> (2) …
>
> (3) Where a person who has made a qualifying loan makes a claim and at that time—
>
> (a) any outstanding amount of the principal of the loan has become irrecoverable, and
>
> (b) the claimant has not assigned his right to recover that amount, and
>
> (c) the claimant and the borrower were not each other's spouses or civil partners, or companies in the same group, when the loan was made or at any subsequent time,
>
> then, to the extent that that amount is not an amount which, in the case of the claimant, falls to be brought into account as a debit given for the purposes of

Part 5 of CTA 2009 (loan relationships), this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant at the time of the claim or (subject to subsection (3A) below) any earlier time specified in the claim.

> (4) Where a person who has guaranteed the repayment of a loan which is, or but for subsection (1)(c) above would be, a qualifying loan makes a claim and at that time—
>
> (a) any outstanding amount of, or of interest in respect of, the principal of the loan has become irrecoverable from the borrower, and
>
> (b) the claimant has made a payment under the guarantee (whether to the lender or a co-guarantor) in respect of that amount, and
>
> (c) the claimant has not assigned any right to recover that amount which has accrued to him (whether by operation of law or otherwise) in consequence of his having made the payment, and
>
> (d) …
>
> this Act shall have effect as if an allowable loss had accrued to the claimant when the payment was made; and the loss shall be equal to the payment made by him in respect of the amount mentioned in paragraph (a) above less any contribution payable to him by any co-guarantor in respect of the payment so made.

6. For CGT purposes "trade" has the same meaning as in the Income Tax Acts (s 288 TCGA) which, under s 1119 of the Corporation Tax Act 2010, "includes any venture in the nature of trade."

7. In *Mansell v HMRC* [2006] STC (SCD) the Special Commissioner (Charles Hellier) after considering the relevant authorities said:

> "88. Section 218 [Finance Act 1994] speaks of a trade "set up and commenced" before, or on or after, 6 April 1994. The words "set up" suggest that a trade can be set up without being commenced. This echoes the distinction drawn in *Slater* (see paragraph 72 above), the distinction between getting ready and commencing in *Birmingham Cattle*, Lord Millett's observation that "the work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customer walks through the door", and the assembly of a "sufficient organisational structure" to undertake the essential preliminaries noted in *Gartry v The Queen* 94 DTC 1947 (T.C.C.). I conclude that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up.
>
> 89. Although none of the cases cited to me dealt directly with the question of when a trade commences, those cases suggest to me the following principles. First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.
>
> 90. Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.

> 91. Third: is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced. It is tempting to say that a trade commences only when the first sale is made. In normal everyday usage one would say that a person starts trading when he becomes entitled to money from his first customer. But, for the following reasons, it does not seem to me that making the first sale is necessarily the earliest time when a "trade is …. commenced" for the purposes of section 218:
>
> > (a) there is a small but fine distinction between "trading starting" and a trade being commenced, which may make everyday usage a pilot slightly out of its home waters ;
> >
> > (b) the comments made by Lord Millett in *Khan v Miah* [2001] 1 All ER (Comm) 282, [2001] All ER 20 tend to suggest that selling the first meal is not the earliest time when trading starts; and
> >
> > (c) for these purposes the extended definition of trade affects the question. The question becomes: when did the trade, manufacture, adventure or concern in the nature of trade start? In normal usage an adventure in trade might start before the "trading" started. An adventure normally starts when the adventurer leaves home, or the merchant first charters his ship rather than when the first monster is killed or the cargo is brought back home and sold.
>
> 92. I note that it is possible that for the linguistic reasons noted in paragraph (c) above, there may be somewhat different considerations relevant to when a trade such as buying and selling flowers commences from those relevant to when an adventure or concern in the nature of a trade may commence.
>
> 93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities - and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.
>
> 94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed, will constitute operational activity is sufficient. At that stage no operational risk has been undertaken: no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement."

8. While it was unnecessary for Henderson J (as he then was) to confirm whether he would have reached the same conclusion as the Special Commission in *Mansell*, at [95] in *Tower MCashback LLP v HMRC* [2008] STC 3366 he said that:

> "… in broad terms I find his test of the beginning of operational activities a useful one. Every case will turn on its own facts, but in general the test

> presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin. Mr Hellier gave as examples of setting up a trade such matters as the purchase of plant, and organisation of the decision making structures, the management and the financing (see paragraph 88)."

9. It is common ground that I should adopt the same approach as the Special Commissioner in *Mansell*, particularly at [93], to the facts of the present case.

FACTS

10. The only witness was Mr Martin Hall who gave evidence for Mr Hunt. Between 6 August 2008 until 4 December 2009 when it went into administration, Mr Hall was the Marketing Director of Altala. Although his employment with Altala formally commenced on 6 August 2008, Mr Hall began working for the business as soon as he had accepted the offer of employment in July 2008. He subsequently became the Chief Executive of the Health Lottery Limited which acquired the Health Lottery business from Altala and remained in that role until the launch of the Health Lottery resigning as a director of that company in August 2012. In addition to Mr Hall's evidence there were 21 bundles of documents. Although there was no statement of agreed facts, there was no real dispute as to the underlying facts and chronology.

11. The Health Lottery is a "Society Lottery". Society lotteries are promoted for the benefit of a non-commercial society to raise funds to support the specific aims and objectives of the society. This can include any charitable, sporting, cultural or other non-commercial purpose. Large society lotteries (ie those with proceeds in excess of £20,000 from a single draw) require a licence from the Gambling Commission. A Society Lottery is able to employ an External Lottery Manager ("ELM") to manage all or part of their lotteries. In its guidance the Gambling Commission notes that this is to enable lottery societies to, "benefit from the experience or economies of scale that come with employing an ELM." An ELM must hold a Gambling Commission lottery manager operating licence and be able to demonstrate its independence from the Society Lottery. The ELM and the Society Lottery will also need to hold a remote gambling licence if they intend to sell tickets by means of remote communication (eg internet, telephone).

12. Guidance from the Gambling Commission in relation to raising money for good causes states:

> "It is not the intention to allow society or local authority lotteries to be promoted for private or commercial gain although it is accepted that an ELM is a commercial business that usually exists to produce a commercial profit.
>
> Each society or local authority lottery must return **a minimum of 20%** of the proceeds to the purposes of the society or local authority (the good cause).
>
> They must also provide consumers with information about the proportion of lottery proceeds (ticket sales) returned to good causes or for local authority expenditure, in a calendar year.
>
> The fact that a society or local authority may employ a licensed ELM to manage all or part of its lottery does not absolve the society or local authority from its responsibility for ensuring that the lottery is conducted in such a way as to ensure that it is lawful and fully compliant with the Gambling Act 2005, related regulations and all licence conditions and codes of practice. "

13. Turning to the facts of the present case, a convenient starting point, on which I shall subsequently expand, is the "brief history" of Altala extracted from information provided by its Board contained in the Administrators' Report, dated 29 January 2010. This explains that

Altala, originally called Health Lottery Limited, was incorporated on 17 May 2007. It continues:

> "2.3 The aim of [Altala] was to launch an alternative to 'The National Lottery' which held a 97% share of the market in the UK. A concept of a lottery with fixed payouts and the beneficiary being a good cause, namely the National Health Service, was created.
>
> 2.4 Upon commencement of trading [Altala] undertook a share exchange agreement with NHS Lotteries Limited, which had developed the concept of such a lottery but had no funding. [Altala] continued the development of 'The Health Lottery' concept.
>
> 2.5 [Altala] was funded by an unsecured loan facility from Barclays Bank for £17.5m for a period of two years, maturing on 26 June 2009. This loan was secured by Credit Suisse. The loan was facilitated by two private individuals, Michael Hunt and Mark Ricketts, for which they received a shareholding.
>
> 2.6 The Companies were subsequently formed as subsidiaries of [Altala]. Given that the lottery did not launch, essentially there was no actual trade in the Companies. However, the Companies did enter into supply contracts in preparation for the anticipated launch of the lottery.
>
> 2.7 Using these funds from Barclays Banks PLC, [Altala] undertook a 16 month planned development phase creating a 'lottery in a box'. Substantial investment was made into developing IT software, systems and websites for the business.
>
> 2.8 [Altala] commissioned market research studies with 1,700 subjects. [Altala] prepared marketing materials and advertising campaigns. An expert team had been recruited to ensure the required operational infrastructures and processes were in place.
>
> 2.9 The specialist assets were purchased and rigorously tested whilst prize insurance was put in place. The business was ready to launch on schedule in the autumn of 2008. A field solutions team were engaged to train the retailers and to ensure there was a strong point-of-sale reference when the lottery launched. Agreements were in place with counter payment terminal providers and transaction network providers.
>
> 2.10 The business plan was to have 'The Health Lottery' available in over 21,000 retailers at launch providing access to within 1 urban mile and 5 rural miles for 98% of UK Customers."

14. It is necessary expand on the above summary, particularly in relation to development of 'The Health Lottery' concept by NHS Lotteries Limited, the funding of Altala, Altala's application to the Gambling Commission for licences to operate a lottery as an ELM, preparations for the launch of the lottery and Altala's accounts for the period to 31 May 2008 and the advice it was given at that time.

NHS Lotteries Limited

15. As noted in the Administrators' Report, after its incorporation in May 2007 Altala undertook a share exchange agreement with NHS Lotteries Limited under which NHS Lotteries Limited, which had developed the concept of a 'Health Lottery', became part of the Altala group.

16. NHS Lotteries Limited had been established on 4 October 2004 to create a lottery, then called the "NHS Lottery", which was described, in its presentations to attract funding, as, "a worthy competitor to the National Lottery in the United Kingdom" with its support for local

hospitals/primary care trusts. Market research had indicated that such a lottery with a lower top prize than the National Lottery but with better odds of winning a substantial guaranteed sum to be popular with the public. The model it had developed utilised existing electronic point of sale terminals in a wide range of retailers.

Funding

17. On 9 July 2007 Mr Hunt subscribed for 2,200 shares in Altala (a 22% share) having, through his nominee the ABC Corporation, instructed Credit Suisse on 27 June 2007 to provide a guarantee to Barclays Bank Plc ("Barclays") in relation to a loan facility of £17,500,000 in favour of Altala. Under the terms of the loan any drawdown required the signature of either Mr Mark Ricketts (a 22% shareholder) or Mr Hunt and a director of Altala.

18. Mr Hunt, through his nominee, the ABC Corporation, gave a guarantee for the loan facility. A secondary guarantee in the sum of £13,000,000 or $^{13}/_{18}$ of the sum required by the creditor had been given to Mr Hunt on 6 June 2007 by Mr Ricketts.

19. The loan was subsequently drawn down in its entirety (£17.5m) by Altala in the following instalments:

(1) £526,465 on 10 July 2007;

(2) £406,030 on 31 August 2007;

(3) £250,000 on 3 October 2007;

(4) £450,000 on 19 November 2007;

(5) £425,000 on 20 December 2007;

(6) £445,000 on 25 January 2008;

(7) £500,000 on 26 February 2008;

(8) £610,000 on 13 May 2008;

(9) £925,000 on 2 June 2008;

(10) £2,250,000 on 3 July 2008;

(11) £3,200,000 on 25 July 2008;

(12) £4,300,000 on 15 August 2008; and

(13) £3,212,505 on 2 October 2008.

20. In a document produced in January 2009 as a presentation for potential investors Altala sought a total of £40 million of which £20.5 million was for recapitalisation of debt and £12 million for launch expenses.

21. On 1 September 2009 Barclays wrote to Altala demanding repayment of the loan of £17,500,000 and banking charges of £100 "forthwith". Payment was made by Credit Suisse from the account of Mr Hunt's nominee, the ABC Corporation. It is accepted that, as HMRC have agreed to "look through" that company, it was Mr Hunt who had guaranteed the loan and made the payment to Barclays. On 15 September 2009 Mr Hunt wrote to Mr Ricketts requiring payment under the secondary guarantee. It is common ground that, despite the efforts of Mr Hunt to pursue the debt, Mr Ricketts, who was declared bankrupt on 13 October 2010, did not do so and that the £17,500,000 paid by Mr Hunt is irrecoverable.

22. Having withdrawn its application to the Gambling Commission on 24 November 2009, as it had been unable to secure fresh finance (see below), Altala went into administration on 4 December 2009. Its assets were sold to the Health Lottery Limited on 13 January 2010 which,

following its acquisition by new investors, successfully launched "The Health Lottery" in October 2011 with all the distinguishable features established by Altala including the logo, advertising campaign and IT systems and infrastructure.

Application to Gambling Commission

23. On 6 June 2008 Altala made an application to the Gambling Commission for a licence to operate the lottery.

24. In a 'Case Summary', prepared by the Commission's Head of Licensing on 2 September 2008 for a hearing to take place on 4 September 2008, it was recorded:

> "**1. Reason for referral to the Regulatory Panel**
>
> The Regulatory Panel are invited to determine the application for an operating licence to operate as an External Lottery Manager ("ELM"). The application has been submitted by [Altala] ('the Applicant').
>
> The Panel are asked to consider the application due to this being a potentially major operation with high revenue and publicity levels. Ticket sales are estimated to be in excess of £200 million over the period 2009-2010.
>
> …
>
> **2. Recommendation**
>
> Commission staff have conducted extensive checks on the Applicant who has been responsive and satisfied our requirements.
>
> The financial support of Mr Hunt and Mr Ricketts (see section 3) led to Commission staff making further enquiries.
>
> Commission staff recommend that the licence be granted subject to the approval of the Panel and suitable conditions preventing the operational influence by Mr Michael Hunt."

25. After noting that Altala has applied for an ELM type C non remote operating licence (annual proceeds above £500,000) and an ELM type H remote operating licences (annual proceeds above £500,000) the Case Summary continued with observations in relation to the key personal relevant to the application. Having noted the previous involvement of Chair of the Board with the bid for, and launch of, the National Lottery and that the experience of the CEO, including his being the Sales and Marketing Director for Camelot, it stated, in relation to Mr Hunt as a 22% shareholder, that he:

> "… was convicted of furnishing information on 30 June 1993. He received a prison sentence of 8 years and was required to pay £513,512 towards costs and was disqualified from being a director for ten years. Mr Hunt states that he has "no part in the management and will be doing no work with the Applicant.
>
> Commission staff are of the opinion that Mr Hunt is not a suitable person to be a controller of a licensed operator. As a relevant person to the application a conviction for a relevant offence as defined in Schedule 7 of the Act demonstrates his unsuitability to be involved with the licensed activities. A shareholder above ten percent is classed as a controller in the Financial Services and Markets Act 2000 as they could influence the operation of the business. The Applicant was made aware of this and Mr Hunt has now place his shares into a trust controlled by two solicitors who have the voting rights."

26. It should be made clear that Mr Hunt, who had been advised by Altala's directors that it would not be a problem, had fully disclosed his conviction to the Gambling Commission in the application by Altala. He had also, in a letter of 11 July 2008 to the Gambling Commission's

Head of Licensing , enclosed his certificate of conviction and made clear that although he had invested in the company he would "have no part in the management and will not be doing any work with the company."

27. In evidence Mr Hall said that before this case he had only met Mr Hunt once previously at a "very early shareholders meeting". He confirmed that Mr Hunt had no involvement with the day-to-day running of Altala and explained that it operated out of a small office with a small number of people and that it was "pretty difficult" for anyone to come and go without being seen. Mr Hall had seen Mr Ricketts, who was "quite keen to know what was going on", in the office a "number of time" and so far as he, Mr Hall, was aware it was Mr Ricketts rather than Mr Hunt that had signed the drawdowns.

28. In relation to Mr Ricketts the Case Summary, somewhat presciently, noted that he:

> "… had a lower than average Equifax score and his listed assets did not appear to be sufficient to hold such a large share in the Applicant. This led Commission staff to ask Mr Ricketts to provide further details of his assets and stated that he has property worth £2.5 million."

29. After referring out the statutory framework in which the application is to be considered, the Case Summary then sets out the following "Background":

> "31 Community Interest Companies (CICs) have been established with the aim of supporting local healthcare services across Great Britain. CICs are limited liability companies which aim to provide a benefit to a community. They are incorporated under the Companies Act 1985 and have to conform to company and insolvency law. CICs are regulated by The CIC Regulator which is an independent public office holder appointed by the Secretary of State for Trade and Industry and is classed as a 'light touch' regulator. Each of the CICs has applied for a type C and type H society lottery operating licence. These applications are ready to be determined by Commission staff following the Panel's decision on the application being considered.
>
> The CICs are trading subsidiaries of Peoples Health Trust (PHT) which was registered with the Charities Commission on 15 August 2008. PHT will raise funds on behalf of the CICs and administer the revenue from the lotteries held.
>
> …
>
> [Altala] will manage the lotteries on behalf of the CICs who will receive 20% of the ticket proceeds. Funds from ticket purchases will go into a ring fenced custodial account managed by Altala Financial Ltd, which is a subsidiary of Altala … . These funds are then passed to PHT to administer on behalf of the CICs.
>
> Altala plans to offer a weekly game on a Saturday evening between 9.00pm and 10.00pm during an advertising break. In effect, a number of lotteries are being conducted each week which are covered by one draw and fall under the banner of 'The Health Lottery'. It is forecast that they will attract an average of four million participants per week. The money from ticket sales will go towards a single named CIC until it reaches £1 million. At this point, this lottery will close and another will open. Another CIC will be named and the ticket sales generated will be dedicated to them from this point until they also reach the £1 million mark. This cycle continues through three different CICs that are preselected for each week. If all three should reach the £1 million mark, proceeds will start to go in the first CIC in the list."

It continues:

> "**6. Suitability Assessment**

Full checks have been carried out with the following results:

a) Finance has been assessed as adequate

As well as securing financial support from shareholders, the Applicant is backed by the Hospitality and Leisure Team at Barclays Bank PLC whom has provided a loan facility of up to £17,500,000. (We have been provided with a copy of this loan agreement). This relationship is managed by the specialist Gaming team at Barclays Bank PLC. The Board and shareholders have approved an operating budget for the first two years of operation. The business reports to the Board against a forecast on a monthly basis. The Board approves monthly funding drawdown requirements from Barclays Bank, in compliance with the covenants of the loan facility agreement. Mr Hunt's or Mr Ricketts' signature was required to make a withdrawal from the loan. As such, Commission staff questioned whether PML's [personal management licences] would be required due to this level of control. In response to the Commission's query, the Applicant withdrew the full amount so the individuals were no longer involved in this way.

…

b) Competence has been assessed as adequate.

…

c) Integrity/Criminality has been assessed as adequate subject to satisfactory restrictions on any possible influence by Mr Michael Hunt.

d) Adherence to Licensing Objectives has been assessed as adequate."

30. At the private hearing on 4 September 2008 the Regulatory Panel of the Gambling Commission indicated that:

> "… so long as Mr Hunt has, or is likely to have an interest in the licensed activities, then the Panel were unlikely to conclude that [Altala] was suitable to carry on the licensed activities and that the application may be refused on that basis."

Having been informed of arrangements made to remove Mr Hunt's voting rights and noting that, as a 22% shareholder, he nevertheless still retained an interest in Altala the Panel decided to adjourn the hearing to allow Altala to make "any arrangements they saw fit" in response to the Panel's following concerns and requirements:

> "(1) Mr Hunt is a person relevant to the Application and has been convicted of a serious fraud. The Panel require the [Altala] to detail all the information relating to Mr Hunt's arrangements as a shareholder and guarantor any steps taken to stop him being a person relevant to the application.
>
> (2) Guaranteeing a prize of £100,000 would require proceeds of £1 million to comply with the Act and with the LCCP. The Commission would expect advertising and terms and conditions to be fair and open in respect of this.
>
> (3) The Panel required [Altala] to provide a legal opinion regarding the 'ring fencing' of customer funds."

31. There then followed efforts to obtain alternative funding which ultimately proved unsuccessful. Therefore, in a letter dated 24 November 2009 Altala wrote to the Gambling Commission withdrawing its application with immediate effect. The letter explained that on 20 November 2009 that the Board had resolved to cease trading and had appointed an insolvency practitioner and lodged a Notice of Intent to Appoint an Administrator. The letter continued:

> "Since the Regulatory Panel of 4 September 2008 put out application into adjournment, pending refinancing and restructuring of the business, we have been making every effort to secure fresh finance. We are grateful to the Gambling Commission for allowing us time to fundraise, but this has not proved possible in such difficult markets. … In these circumstances we have taken the decision not to continue with our current applications."

Preparations for launch

32. By July 2008, when Mr Hall first became involved with Altala, preparations for the launch of the Health Lottery were already underway. He explained that, due to the economics of lotteries being very unusual, the launch of the lottery was vital to its success. This is because a lottery has its highest ticket sales at launch and during its first four weeks of operation following which sales go into a steady decline and revenues can only be boosted by the introduction of new innovations such as an extra draw, scratchcards or other new game. Unlike most other consumer goods, where it is possible to introduce a product gradually, refine it and steadily increase market share, a lottery is entirely dependent on the success of its "big bang" launch with there being no second chances. The nature of the business also requires substantial expenditure to develop the product before tickets are available for sale.

33. The preparations for the launch of the lottery, which are described in more detail below, included the design, procuring and manufacture of 'Play Cards', seeking agreement from retailers and use of terminal systems, advertising and marketing, establishment of a customer contact centre, production of IT infrastructure, purchase of lottery ball machines and arrangements for the draw including prize insurance and the good causes to be supported.

Play Cards

34. Altala produced approximately four million play cards which were the main physical item it produced. A play card, which was made of plastic, enabled a consumer to play the lottery on a regular basis using the same numbers. The numbers would only need to be entered by a retailer once and could be used on subsequent occasions by being swiped through a terminal which would identify the numbers and produce a paper ticket. An alternative way to play would be to request a "Quick Pick" to generate random numbers.

35. Play cards were developed to reduce retailer handling times and provide a reminder to users to play the lottery. As retailers earn very minimal commission on the sale of ticket (4p – 6p), the main benefit to them being increased footfall, it was important to keep processing time as short as possible to make the product compelling. It was also necessary to ensure the play card technology worked consistently and efficiently across both the PayPoint and ePay networks.

36. The production of Play Cards was co-ordinated by the Contract Company which subcontracted the work to multiple manufacturers. Production of the cards had a lead time of approximately 12 weeks and, as such, it was necessary for production to be completed in advance of the Gambling Commission decision to meet the planned launch date. Although not the same cards as those produced by Altala, the "Quick Pick" card and instruction leaflet currently used by the Health Lottery are substantially the same design as the Play Cards developed by Altala.

Retailers and retail terminals

37. To enable customers to play the lottery at retailers the Altala developed a system to utilise existing retail structures rather than put additional structures in place. Altala entered into agreements with two key retail providers, PayPoint and ePay which have terminals through which lottery tickets could be bought in over 30,000 retailers on 18 June 2008.

38. Under the terms of its agreement with PayPoint, which was to achieve 12,500 active retailers within six months and 15,000 at the end of nine months to preserve exclusivity in the convenience stores sector jointly with ePay, Altala was required to pay the following:

- Set Up Fee of £155,000 (50% paid in advance and 50% after completion of user acceptance testing);
- System Upgrade Fee of £270,000 (£230,000 paid in advance and £30,000 after completion of user acceptance testing) with the fee being offset against a reduction in the agreed commission payable during the first 12 months;
- A sales transaction fee of 4.5% for sales up to £50 million per annum, 3.5% for sales between £ 50 million and £150 million per annum and 2.5% on sales above £150 million with an additional 0.5% payable through the Collections Agreement;
- A prize payout transaction fee of £0.04.5 per transaction with an additional 0.5% payable through the Collections Agreement;
- 5% commission on sales payable to PayPoint retailers (covered in the Collections Agreement); and
- 1% commission on £50 prizes paid payable to PayPoint retailers (covered in the Collections Agreement).

Payments by Altala under the agreement with ePay, which was required to achieve 6,375 active retailers within six months and 5,000 at the end of 12 months to preserver exclusivity with PayPoint, included the following:

- A Set Up Fee of £65,000;
- 5% commission on sales payable to ePay retailers;
- 4% commission on sales payable to ePay; and
- 1% commission on £50 prizes paid payable to ePay retailers.

39. Altala appointed Geneity Limited ("Geneity"), which had developed software for other lotteries internationally and for gaming companies such as Betfair, Ladbrokes, William Hill and the Tote, to develop the software for the Health Lottery. Under the terms of the agreement entered into between Altala and Geneity on 1 July 2008 Geneity was to develop and support Altala's core lottery management software for payments by Altala of £320,000 for development, with £100,000 due on acceptance and a further £100,000 bonus if the first four Saturdays were trouble free. In addition £103,000 payable quarterly in advance was to be made for support.

40. A system was built to Altala's specification for the handling of the draw and prizes which connected from retail shops through a communications network to Altala's systems. The coverage facilitated by the network providers allowed Altala to target 21,000 outlets at launch, providing access to 98% of UK consumers within one mile urban and five mile rural distance.

41. In addition to having the system in place it was also necessary to obtain the agreement of retailers to sell the lottery tickets and allow point of sale advertising to be placed in store. Mr Hall and Altala's Sales Director, Mr Tony Holmes, visited stores and made presentations to the boards of the larger retailers. By August 2008, 21,000 retailers had agreed in principle to support the Health Lottery. These included Costcutter, SPAR, Budgens, Nisa-Toady's, Londis, Premier, McColl's, Esso, Somerfield, Morrisons, Mills, Total and Co-op.

42. Altala was also at an advanced stage of discussion and negotiation with key retailers for a second roll-out in which the Health Lottery would be integrated into their own bespoke EPOS systems. This involved expansion into traders that did not use either PayPoint or ePay systems but had their own systems notwithstanding the potential risk and complications of possible interference with those systems. This, Mr Hall said, was a completely new and innovative method of selling lottery tickets which had not been achieved by the National Lottery. Altala's most notable progress was with W H Smith with its weekly footfall of 60 million. Following a presentation at its head office agreement was reached for the development of software to allow tickets to be issued from its till systems and internal communication was initiated to ensure delivery.

43. Discussions were also ongoing with Boots, Tesco, Clinton Cards, BP, Sainsbury's, ASDA and Waitrose. This involved presentations at their respective head offices with the intention of securing promotion of the Health Lottery on their schedules. Mr Hall explained that the promotion schedules of such retailers are usually set around 16 weeks in advance and it was important for Altala to agree an approved programme. The progress with these retailers suggested to him that they were likely to join after the initial launch.

44. In order to promote the system to small retailers, Altala entered into an agreement with Field Sales Solutions ("FSS") to raise awareness and provide training throughout the entire retail network. Because of Gambling Commission requirements, the sales force had a dual role, in addition to maximising the tickets sold for the benefit of the community interest companies ("CICs") it was necessary for them also to ensure there was compliance with the regulations (eg ensure tickets were not sold to anyone aged under 16). They were also responsible for the placement of point of sale material, described below, in the 21,000 stores.

45. FSS were to place 250 staff "on the ground" to visit all retailers twice before the launch of the lottery. This was to take place around eight weeks before the launch. After the launch of the lottery, FSS were to visit the 10,000 lowest performing outlets to provide performance improvement advice. Mr Hall explained that a core group of 50 staff was trained to go and speak with retailers to perform what he described as the "pressure test", a test of Altala's systems carried out by sales teams at terminals at retailers premises in which 1,000 transactions took place in a single second. Following the successful outcome of the test the 50 staff were to go back to FSS and "cascade what they had learned to other people."

Advertising and marketing

46. In July 2008 Altala appointed Delaney Lund Knox Warren ("DLKW") described by Mr Hall as "an internationally recognised, heavyweight creative advertising agency" and "deep experts on brand launches" to begin development of its advertising. He said that he was "happy" to work with them and that the lottery project was dealt with "seriously" at a "senior level". Fees were agreed on a monthly schedule commensurate with the work undertaken in that month and by March 2009 Altala had paid £440,000 in fees to DLKW.

47. By the time Mr Hall joined Altala, as the aim was to attract 85% of the population at least once before launch and 60% in the three weeks beforehand, an extensive advertising brief had been submitted to DLKW specifying that it wanted a multi-media campaign to include television, radio, posters and leaflets. DLKW were at the "script stage" and Mr Hall's roles was to review the scripts and identify how these were to be produced including the scale and costs of production.

48. Part of the process concerned whether a "star" should be engaged for the advertisements. However, it was decided that a celebrity would distract from what the lottery offered and it was decided that five wigged characters matching the five lottery balls together with a celebrity voice was a much better way of conveying the brand. MMR Research Worldwide Limited

("MMR"), which Mr Hall described as "global leaders in consumer research", were commissioned to conduct a survey of "celebrity liking and recognition" leading ultimately to Brian Blessed being chosen to voice the advertisements for the Health Lottery.

49. The media planning and contract negotiation was undertaken for Altala by marketing specialists, Walker Media. This included contracts with print media, radio and major television channels for which air time was booked and paid for. Mr Hall explained that although this cost would usually be covered by media insurance, because Altala was a new and unproven business it was necessary to make payment "in full up front". He also explained that, as with all media companies there are pre-negotiations with television channels and poster companies. Altala provided the details of the type of person which the advertising was to be aimed at and the sort of television programme which would be most suited for that target audience. This was something that would be done in the 12 weeks before launch. However, the main issue related to the broadcasting of a live draw as part of a television advertisement, something that had never previously been done.

50. Meanwhile, by July 2008 a variety of different draft logos for the Health Lottery had been proposed illustrating different expressions of health and happiness such as a heartbeat, a beating pulse and a stethoscope. The decision on the final logo, a multi coloured heart surrounding the words, "The Health Lottery", was influenced by the outcome of market research and agreed by the Board of Altala. To ensure the logo was protected in December 2008 Altala submitted a large number of trademark applications across a range of classes which included the colourful heart shaped logo. However, there were objections to some of these applications from European companies in addition to the Tote which opposed the application for "Quick Pick". However, Altala managed to address the various objections and register the trademarks. The colourful heart logo and branding was subsequently used for the launch of "The Health Lottery" by Altala's successor, the Health Lottery Limited, and still remains in use.

51. To stimulate consumer interest in the lead up to the launch Altala appointed the Big Kick, now known as TBK Group, described by Mr Hall as "a leading sales promotion agency" that had worked with other "household names". The Big Kick developed a promotion campaign intended to be executed in the days leading up to the launch with a target of eight million play cards to reach consumers on the first weekend of the lottery. This was to be achieved by focussing on building awareness and coverage in "high traffic", creating excitement about the Health Lottery and distributing play cards at busy shopping centres whilst dressed in the recognisable coloured wigs. However, as it did not launch the lottery the campaign devised by Big Kick was not executed by Altala.

52. In addition, in order to entice players into retail premises and promote the Health Lottery to those already instore Altala engaged in what Mr Hall described as "far reaching" point of sale marketing efforts with the intention to "dominate the last ten feet". To do so the multi-coloured heart logo, described above, was to be displayed on:

(1) Play Stands, a combination of metal and plastic approximately 5½ feet tall holding a variety of Play Cards, leaflets and advertising for the game and its prizes which were to be placed in retailers;

(2) Store wall signage which involved signs being physically screwed into internal walls of a retailer's premises;

(3) Shelf strips;

(4) Till stickers;

(5) Wobblers – small signs that stick out from the edge of a shelf;

(6) Retailer handbooks;

(7) Signs outside retailers premises; and

(8) Mugs, T-shirts, pens, balloons.

Many thousands of items were ultimately produced including over 150,000 stickers, 85,000 wobblers and 250,000 shelf edge strips. Posters were also targeted to appear within 50 metres of retailers selling Health Lottery tickets.

Customer contact centre

53. Altala had also appointed The Contact Company, which had dealt with phone-ins for the BBC, to establish a dedicated call centre in Liverpool for handling contact from consumers and retailers and to be able with general queries about the lottery such as how to use the Play Card and claim winnings. The initial set of the contact centre which included the purchase of telephone lines and interactive Voice Response technology to manage calls cost Altala £30,000. The contact centre was to have a key role in the public relations of Altala with anybody who won £10,000 or more being collected by car and brought to a "winners centre" or enclosure at the contact centre where the prizes would be distributed and photographs taken. Altala was also intending to establish a winner centre in the South to host southern lottery winners.

54. It was intended that staff levels would be flexible in accordance with demand and by the time of the Gambling Commission decision, in September 2008, the Contact Company had begun staff recruitment in readiness for a November 2008 launch and would have trained approximately 20 people by this time. However, the contact centre was not utilised by Altala and while he could not certain Mr Hall thought that the centre had been mothballed.

IT infrastructure

55. Extensive progress with the negotiation and implementation of the IT through contracts with Ardenta and Geneity had been secured by the time Mr Hall had become involved with Altala in July 2008. Ardenta provided the major IT infrastructure which enabled the data from a lottery ticket purchased from a retailer to be processed and stored. It was necessary for the system to be able to operate under a high load and be extremely resilient as the lottery would have failed if the system had been unable to cope whilst live, particularly if this had happened during sale for the first draw.

56. To ensure the reliability and security of the network two sites were established that were 200 miles apart so that if one destroyed the other would be capable of functioning independently with replicated data and no interruption to consumers or the lottery draw. The IT systems had been implemented and fully tested by January 2009 following months of trials of artificial ticket sales which included running tests imitating 360 transactions per second for a sustained three hour period. This that the systems were robust and suitable for processing surges in consumer activity. These tests also included a store test in which tickets were produced in an actual store.

57. The Ardenta infrastructure remained in place following the administration of Altala and was in use at the launch of the Health Lottery by its successor in October 2011.

Lottery ball machine and draw

58. To attract and maintain public attention Altala wanted to have the lottery draw broadcast live on national television. However, in accordance with the Advertising Standards Authority guidelines the Health Lottery draw could not form part of a regular television programme (the National Lottery had a special exemption and is permitted to have a separate televised show for its draw). It was therefore decided that the Health Lottery draw would take place as a live

60 second long advertisement at 9pm every Saturday night during the first commercial break during the X-Factor on ITV which, at the time, recorded the highest audience viewing figures.

59. Mr Hall explained that live advertising, as proposed by Altala, was “more or less unheard of”. Ordinarily, he said, advertisements would be pre-recorded well in advance and delivered around a week in advance to the television channel for airing and it took “considerable negotiation” to persuade ITV to effectively give Altala “access to their live access feed for the purposes of the draw”. The challenge of negotiating with ITV to place a live advertisement was facilitated through Walker Media and North One Television.

60. It was envisaged that the majority of the advertisement would be pre-recorded leaving a matter of seconds when the presenter would press a red button to release the balls into the machine and announce the numbers live on air. It had also been decided that the lottery draw would be presented by a recognisable celebrity. Customer research had shown that Melinda Messenger would be a popular host and she was engaged as the lead presenter (and continued to hold that lead role when the lottery was eventually launched in 2011).

61. Altala contracted with North One Television, which has experience in this type of work including live Formula One broadcasts, to develop a script and construct a plan for shooting the live shows. Prime advertising slots during the commercial breaks in the X-Factor, reaching some ten million viewers, had been pre-negotiated and payment of the deposit to commence building the set was imminent when a delay in the launch date to 2009 was announced.

62. As the draw was to be televised it was decided to obtain a lottery ball machine with optimum visual appeal. Two identical lottery ball machines were acquired by Altala in mid-2008 at a cost of €145,000 together with several sets of balls. The machines were securely stored at separate sites. Due to the 60 second television slot the machines were required to generate random numbers very quickly and work was undertaken to ensure that this was achieved. In order to demonstrate to the Gambling Commission that the machines were capable of this Altala commissioner the University of Salford to carry out tests to verify the randomness of results produced. It was these machines that were ultimately used when the Health Lottery was launched in 2011.

Prize insurance

63. Although, on average a lottery will seek to give prizes totalling a predicable proportion of the total takings from ticket sales the amount of prizes won can vary enormously from one week to the next. Mr Hall explained that with an average revenue of £4.8 million the total prizes could vary between around £400,000 to £15 million. To accommodate such variance a lottery operator either requires a substantial cash cushion or obtain specialist insurance. Additionally the Gambling Commission wanted reassurance that consumers’ winnings and charity monies were protected.

64. Altala therefore obtained prize insurance from Miller Insurance Service Limited at premium of £285,000 adjustable at a rate of £0.57 per ticket of which £185,000 was paid in December 2008.

Good causes

65. In accordance with Gambling Commission requirements 20% of the lottery takings were to be directed to health-related good causes. To facilitate this 52 CICs had been established under the control of a charitable trust The People's Health Trust. The trust and the CICs were independently run and had the objective of raising money for health projects within their local area. The CICs were to have the expertise in identifying appropriate health-related charitable projects and making grants. The structure was arranged so that the Gambling Commission could be assured that the CICs received the revenues generated by the ticket sales with the

lottery being that of the CICs with Altala as the ELM to the CICs supplying lottery management services in return for a fee. In evidence, Mr Hall compared the relationship with the CICs as Altala being:

> "… the equivalent of Network Rail. We provide the train track. We provide the ticket sales facilities, but the trains are the CICS. So everything that we built was for the CICs to be able to send their trains down effectively, and that is quite important, that is statute, that is the Gambling Commission and law that sets that."

He continued:

> "Altala put the train tracks down and in place, tested it, printed tickets out at retailers, invested in advertising, invested in its insurance. … So Altala put in place all of the operational parts of the business required for us to be able to achieve a launch within 12 weeks."

66. Each week two CICs were to be selected to be the beneficiaries of the lottery draw for that week. The money collected by PayPoint and ePay was, after deduction of commission to be paid into the accounts of the CICs which would retain 20% for good causes and 45% as the prize fund with the balance to be paid to Altala from which the costs of running the lottery, retailer commission etc would be met.

67. Altala had contracts with each of the CICs to provide lottery management services. An example of such an agreement was that, dated 21 April 2009 between Altala ELM Limited ("Altala ELM") and Indigo Health CIC.

68. The "operating provisions" of the agreement are contained in Clause 1 which includes definition of "Operating Licences" and "Society Licences", as those applied for by Altala and the CIC and which "when granted by the Gambling Commission" will entitle Altala to provide the services of an external lottery manager and the CIC to operate large society lotteries. Clause 2 of the agreement states:

> "2 **CONDITIONS PRECEDENT**
>
> 2.1 It is a condition precedent to the obligations of each of the Parties under this Agreement that:
>
> 2.1.1 Altala is granted the Operating Licences; and
>
> 2.1.2 The CIC is granted the Society Licences.

By clause 4.1 Altala ELM Limited agreed to provide certain services to the CIC. In return the CIC agreed (at clause 6.1) to pay certain fees. The detail of the services to be provided is set out in Schedule 1 to the contract, which provides:

Schedule 1

The Lottery Services

> 1. Altala ELM shall provide to the CIC the Services in its role as an external lottery manager, under the Operating Licences which licence it to manage the operation of lotteries on behalf of the CIC.
>
> 2. All of the Services are to be provided in strict accordance with the Operating Licences granted to Altala ELM and the Society Licences granted to CIC, as applicable.
>
> 3. The Services will include, *inter alia*:
>
> (a) making all necessary arrangements for the online and offline sale of Lottery Tickets (to include the printing of the Lottery Tickets);

(b) making all necessary arrangements for the conduct of the Lottery Draw including procuring the equipment required to make the draw and by means of agreements with an appropriate broadcaster and production company;

(c) preparing the financial statements and regulatory returns as may be required by the Gambling Commission from time to time;

(d) supervising and managing the provision of services by Altala Financial Limited to the CIC;

(e) making all necessary arrangements for a customer services facility for customers of the Lottery;

(f) marketing the Lottery (to include printing, distribution and publication of promotional material relating to the Lottery and any other arrangements for the advertising of the Lottery).

69. As has already been noted, Altala never did obtain operating licences from the Gambling Commission. As for the CICs, a "Commercial Review" undertaken by Altala, dated 18 December 2008, recorded that as of that date:

> "The CICs are currently seeking to obtain licences to provide lotteries as "large society operators" under the Act."

Accounts and advice

70. Altala's corporation tax "New Company Details" notification to HMRC, dated 29 August 2007, described its business as that of a "holding company in management of lottery activity". The only set of financial statements produced for Altala, for the period ended 31 May 2008, which state that it commenced trade on 1 July 2007, describe its principal activity as being:

> "To develop and provide business services to society lottery operators."

71. Advice given to Altala by its accountants, BDO Stoy Hayward LLP, in a letter of 3 June 2009 enclosing the completed corporation tax return for review and signature before it was submitted to HMRC included the following:

> "**Pre-trading Expenditure**
>
> Based on the financial statements and the additional information provided to me, it would appear for tax purposes the company [Altala] should not be regarded as trading during the period. A trade is not normally regarded as having begun until a business is both in a position to offer the goods or services and actually does so or offers to. Consequently the expenditure incurred will be treated as pre-trading expenditure and will instead be regarded as being incurred on the first day that trading commences. This applies to both revenue and capital expenditure.
>
> It should be noted that the expenses will then be subject to the usual rules regarding their deductibility for tax purposes."

This advice was seen and accepted by the CEO of Altala and also by its legal advisers, Hillier Hopkins LLP. It also formed the basis for the Altala's corporation tax return and computations.

72. Although a launch date of 4 October 2008 had been agreed by Altala's Board which was initially to be delayed until 11 October 2008 and further delayed, Altala never did launch the Health Lottery. Neither was there any media launch or preparatory promotion campaign and, other than those involved in the testing process, retailers were not trained. The Contact Centre was mothballed and the paper material was placed in storage.

DISCUSSION AND CONCLUSION

73. Mr Mayes, for Mr Hunt, contends that activities described by Mr Hall were sufficiently closely linked to revenue activities to constitute operational activities. He says that these go beyond the kind of "review of the possibilities" which the Special Commissioner at [90] in *Mansell* (see paragraph 7, above) considered would not suffice. He points to the significant sums that Altala spent with the aim of generating income from ticket sales and submits that the *Mansell* test does not require that such efforts come into fruition. The fact that the lottery launched only after the business changed hands does not, Mr Mayes says, detract from those operational activities.

74. For HMRC, Mr Bracegirdle (who accepts that if Altala had been granted a licence from the Gambling Commission it would have been trading) contends that as a Gambling Commission licence was not obtained Altala did not, and could not, commence a trade of running or managing a lottery. Although he also submits that Altala did not have the funds to launch the lottery, Mr Bracegirdle's primary submission is that notwithstanding the "great deal of preparatory work" undertaken by Altala and the "great deal of money" it spent, Altala had not commenced operational activities. He refers to the "condition precedent" in the agreement it had with the CICs requiring the licences to be obtained and the cotemporaneous view of the trading position of Altala in the Administrators' Report, Accounts and advice Altala received (see above at paragraphs 13, 70 and 71, above, respectively) in support.

75. Although Mr Bracegirdle is correct to say that the Administrators' Report, at paragraph 2.6, refers to there being "no actual trade", it also states, at paragraph 2.4, that Altala undertook a share exchange agreement with NHS Lotteries Limited, upon "commencement of trading". Despite the absence of such contradictory statements in Altala's accounts or in the advice it received, I find these to be only of very limited assistance as neither addresses the position in relation to the approach of the Special Commissioner in *Mansell*, as both parties agreed I should in reaching my decision in this case.

76. Applying *Mansell*, it is not disputed that in the present case there was a "fairly specific concept of the activity to be carried on (see [89] of *Mansell*). It also seems to me to be clear that Altala did far more than undertake "merely a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind" (see [90] of *Mansell*). As to whether Altala began its operational activities, as Henderson J observed, at [95], in *Tower MCashback*, the test "presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can be begin."

77. Obviously, as Henderson J said at [95] in *Tower MCashback*, "every case will turn on its own facts" however, some assistance can be derived from the examples given by Special Commissioner at [88] of *Mansell* where he refers to "setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing."

78. Having regard to all the circumstances of the present case, particularly by the production of Play Cards, by its dealings with retailers, by engagement with third parties regarding advertising and marketing, by its creation and testing of IT systems and sales infrastructure and purchase of lottery ball machines, Altala had, in my judgment, clearly established a framework or structure for the trade. The question is whether it progressed from this stage to begin operational activities?

79. As is clear from [93] of his decision, by "operational activities" the Special Commissioner in *Mansell* meant "dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk". This includes "entering a contract to provide goods

or services." It is also clear from the decision of the Special Commissioner (at [91]) that it is not always necessary for a sale to be made or a service supplied before a trade can be said to have commenced.

80. Although, because it did not hold an Operating Licences from the Gambling Commission, the condition precedent in the contracts with the CICs was not met, Altala nevertheless not only entered into agreements with the CICs to provide services but, as described above, created the infrastructure for a lottery and entered into dealings with third parties as required by that agreement, eg by making arrangements for the sale of tickets, procuring the equipment required to make the draw and making agreements with "an appropriate broadcaster and production company". In doing so Altala incurred substantial expenditure and clearly put its money at risk in the hope that it would give rise to profits.

81. Having regard to all the circumstances case, I consider that Altala did engage in operational activities in which it incurred a financial risk. As is clear from *Mansell*, this is sufficient for it to have commenced trading. It therefore follows that Mr Hunt is entitled to the relief claimed under s 253(4) TCGA.

82. Accordingly, for the reasons above, his appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

83. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 06 AUGUST 2019